# On D.C. School Closings

# Dual Standards

## Introduction

In 2008 the District closed 23 public schools. Those closures followed the closing of some 55 public schools, beginning in 1976. Recently, Chancellor Kaya Henderson announced yet another round of closings, 15 in total, including 13 at the end of this school year and two additional schools at the end of next school year.

It is clear and undisputable that the closings in 2008 and those scheduled for 2013 and 2014 have had and will have a disproportionate impact on students of color and individuals with disabilities. These school closings have been and are being undertaken by the District without demonstrating educational necessity and without considering other, equally and perhaps more effective measures to reduce costs at a lesser burden on the affected classes.

While the United States Constitution requires colorblind policies and practices to promote equal educational opportunity these school closings do not. Indeed, these school closings promote less educational opportunity for students of color and individuals with disabilities and at the same time continue to promote a dual and disparate school system within the D.C. Public Schools.

Of the 6,375 students affected by the 2008 school closings, 5,818 or 91.3% were Black; 509 or 8.0% were Latino or Hispanic; 33 or 0.5% were other people of color; 880 or 13.8% were special education; and only 15 or 0.2% were White. Of those, 4,895 or 76.8% were low income.

The discriminatory effect of those closings is so clear and so obvious that the data speaks, without more. Worse, there has been no examination by the District Government of the impact of the 2008 closings, despite a requirement in the Mayoral Takeover Law that such an examination takes place twice each decade. Moreover, rather than saving resources, a recent Report indicates that the 2008 closings actually lost resources.

This pattern and practice of discretionary discrimination is even worse with the proposed 2013-2014 school closings. Of the 2,792 students affected, 2,600 or 93.1% are Black; 180 or 6.4% are Latino or Hispanic; 13 or 0.5% are Asian or other people of color; both schools serving special education students will be closed; and only 2 or 0.1% are White. Again, of the total, 2,295 or 82.2% are low income. The following Chart created by Mary Levy, an Attorney and Education Expert, also speaks, without more:

| **School Closings 2013** | Number of group in closed schools | Group as % of all students in closed schools | Total number of group | Group as % of all students | Percent of group in closed schools | |
|---|---|---|---|---|---|---|
| All students | 2,571 | 100.0% | 45,191 | 100.0% | 5.7% | |
| Blacks | 2,402 | 93.4% | 30,889 | 68.4% | 7.8% | |
| Hispanic | 159 | 6.2% | 6,230 | 13.8% | 2.6% | |
| White | 1 | 0.0% | 4,175 | 9.2% | 0.0% | |
| Asian/Other/unknown | 12 | 0.5% | 1,661 | 3.7% | 0.7% | |
| Low-income | 2,104 | 81.9% | 29,939 | 66.2% | 7.0% | |
| ELL | 108 | 4.2% | 4,284 | 9.5% | 2.5% | |
| All levels spec ed | 596 | 23.2% | 6,493 | 14.4% | 9.2% | |
| Levels 3 & 4 spec ed | 272 | 10.6% | 2,002 | 4.4% | 13.6% | |
| | | | | | | |
| **School closing 2013-14** | | | | | | |
| All students | 2,792 | 100.0% | 45,191 | 100.0% | 6.2% | |
| Blacks | 2,600 | 93.1% | 30,889 | 68.4% | 8.4% | |
| Hispanic | 180 | 6.4% | 6,230 | 13.8% | 2.9% | |
| White | 2 | 0.1% | 4,175 | 9.2% | 0.0% | |
| Asian/Other/unknown | 13 | 0.5% | 1,661 | 3.7% | 0.8% | |
| Low-income | 2,295 | 82.2% | 29,939 | 66.2% | 7.7% | |
| ELL | 123 | 4.4% | 4,284 | 9.5% | 2.9% | |
| All levels spec ed | 778 | 27.9% | 6,493 | 14.4% | 12.0% | |
| Levels 3 & 4 spec ed | 450 | 16.1% | 2,002 | 4.4% | 22.5% | |
| | | | | | | |

As is evident from this 2013-2014 School Closings Plan, these ordinarily protected classes of students will no longer have neighborhood schools; will have to negotiate longer distances to attend school at costs to safety and personal resources when they are already disproportionately exposed in those regards; and as the 2008 experiment demonstrates, will likely have less resources and fewer educational tools in their new school environments. Moreover, the closings do not take into account the irrefutable value of educational continuity that neighborhood schools allow. Librarians, art and music teachers and enhanced recreation and after school programs now absent are not likely to magically appear when saving money rather than educating children is the driving force.

Poverty is the most accurate predictor of poor performance. Failing to understand this widely recognized view, the Chancellor by these closings disproportionately punishes Black, Brown and poor people in ways that the law does not permit.

## The Hobson v. Hansen Precedent

A 1967 Federal Court, class action decision overturning the District's unconstitutional Tracking System resulted in the resignation of the School Superintendent that year and ushered in the first ever elected School Board in 1968. The case of *Hobson v. Hansen*, 269 F. Supp. 491 (D.D.C. 1967), affirmed sub nom., *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) was brought by former D.C. Councilmember Julius Hobson. The case raised serious questions about ability grouping. The lawsuit alleged that low-income and Black students were denied equal educational opportunity as a result of the District's discriminatory practices. Judge J. Skelly Wright found that the tests were not actually measuring ability.

The *Hobson* case, the first of two cases brought by Councilmember Hobson, followed the case of *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954), which outlawed the segregated school system in Washington, D.C. that existed prior to 1954. In Hobson I, Judge Wright stated, "[T]he minimum the Constitution will require and guarantee is that for their objectively measurable aspects these schools be run on the basis of real equality."

## The Waddy Decree

The decision in *Mills v. Board of Education of the District of Columbia*, 348 F. Supp 866 (D. DC 1972) is also instructive. *Mills* was a civil action brought in Federal Court on behalf of seven special-needs, school-age children who sought their right to a free public education, which was being denied by the District of Columbia School Board. That case too was a class-action.

The Board of Education claimed the children were unable to be educated in public schools due to their "exceptional" needs, which included mental illness and mental retardation. The Board further claimed the cost of providing private educational services was too expensive; therefore, the children remained at home without access to an education.

Judge Cornelius Waddy found in favor of the Plaintiffs and held that free public educational services, or a suitable private alternative paid for by the Board of Education, must be delivered based on the students' individual needs, regardless of cost to the School Board. Judge Waddy's reasoning is particularly instructive, "Constitutional rights must be afforded citizens despite the greater expense involved . . . the District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.

Plaintiffs' entitlement to relief in this case is clear. The applicable statutes and regulations and the Constitution of the United States require it."

## Laws Broken – Statutes Implicated

The current School Closings Plan reflects a number of actions that are implicated and not tolerated by local and federal laws, substantive and procedural. As a consequence, affected parents, students, administrators and teachers will pursue a short and long term legal strategy in an effort to block the closings. Among those local and federal laws are the following:

### The D.C. Human Rights Law

The intent of the D.C. Human Rights Law, found at District of Columbia Code, Title I, Chapter 25, is to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business. Specifically the Law prohibits discrimination in education from nursery school through college in all aspects, from academic to vocational training. In general, the Law prohibits the denial or restriction of "the use of, or access to, any of [an institution's] facilities or services to any person otherwise qualified." It is illegal to inquire about or to keep records of an individual's race, color, religion, or national origin.

Accordingly, a Complaint has been filed with the D.C. Office of Human Rights alleging violations of the prohibitions against race and disability.

### Title VI of the Civil Rights Act of 1964

Title VI of the 1964 Civil Rights Act as well as the Department of Education regulations implementing that Act like the D.C. Human Rights Law prohibit recipients of federal funding from discriminating on the basis of race, color, or national origin, 42 U.S.C. §§ 2000d-2000d-7. Under Department of Education regulations, schools and districts violate federal law when they adopt and implement facially neutral policies, and the policies nonetheless have an unjustified effect on students on the basis of race or disability. The prohibited practices which result in "disparate impact" on students of particular races are ordinarily scrutinized on a three-part basis. First, do the school closings result in a disparate impact on students of a particular race as compared with students of other races? If the answer is yes, a *prima facie* case of disparate impact discrimination, as here, is established. Second, are the school closings necessary to meet an important educational goal? Third, if the closings do serve an important educational goal, are there comparably effective alternatives that would meet the School District's goal without disproportionately burdening minority students or students with disabilities?

Any fair analysis of the facts in the instant situation clearly demonstrate the presence of a *prima facie* case of disparate impact; show no educational necessity; and fails to consider reasonable, less discriminatorily impactful alternatives. As a consequence, a long-term look at litigation in

Federal Court or before a federal Agency, such as the Department of Education's Office of Civil Rights or the D.C. Office of Human Rights, on a local and/or national basis, is being considered.

### Rehabilitation Act of 1973/ Americans with Disabilities Act of 1990

Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990 prohibit recipients of federal funding from discriminating on the basis of disability, 29 U.S.C. § 794; 42 U.S.C.A. § 12101 et seq. Similarly, one must examine if the school closings result in an disparate impact on students with disabilities as compared to students who do not have a disability? If so, the same three-part examination is made.

Any Complaint filed on the local or federal level, in court or before an appropriate agency will seek to vindicate the rights of students of color and those with disabilities who have been disproportionately affected by the school closing decisions and ensure that future school closings do not produce similar disparities for those same students.

### Procedural Due Process – Decisions in the Dark

While the Chancellor has purported to have held "Conversations with the Community" in advance of announcing the school closings, the fact is that effort did not meet the strict statutory and regulatory scheme required in the District of Columbia and the ultimate decisions were made in the dark in violation of the Sunshine Amendment. Congress made it clear that public observation of the governmental decision-making process has a salutary effect. The Sunshine Amendment was offered on the House Floor and accepted without substantive debate. The Sunshine Amendment as part of the Self Government Act states, "(a) all meetings (including hearings) of any department, agency, board or commission of the District government, including meetings of the District Council, at which official action of any kind is taken shall be open to the public. *No resolution, rule, act, regulation or other official action shall be effective unless taken, made, or enacted at such meeting*," (emphasis supplied). These school closing decisions are all final and formal actions. There are no exceptions. At the time of passage of the Self Government Act, several court rulings were instructive. For a meeting at which final decisions were made to be public, it was not enough that it be held in a public place, it could only be deemed public if there was advance notice and reasonable opportunity for citizens to attend. *Bigelow v. Howze*, 291 So. 2d 645, 647-48 (Fla. Dist. Ct. App. 1974). And see *Hough v. Stembridge*, 278 So. 2d 288, 291 (Fla. Dist. Ct. App. 1973), where the court held, "Although the [Sunshine Law] does not specifically mention such a requirement, as a practical matter *in order for a public meeting to be in essence 'public,' we hold reasonable notice thereof to be mandatory*." (emphasis supplied).

## Other Impacts

### Negative Impacts of Discretionary Discrimination

These school closings clearly have a negative impact on the protected classes. Students in the neighborhoods with closed schools will be forced to travel longer distances to schools than other

students. This will often require walking through unfamiliar and even dangerous neighborhoods. In other cases it will require car or public transportation at a burdensome cost to families.

In addition, in some cases students will be transferred to schools that, by the District's own measurements, are performing no better than their closed neighborhood school had been. These consolidated schools will be overwhelmed with the sudden influx of greater percentages of new students and students with disabilities. Any delay in the provision of special education services to affected students will have a compounding adverse impact on students with disabilities from both the closed schools and the new transferring schools and likely lead to greater failures of the District to provide a free and appropriate public education.

The school closures also promote what has been described by a recent, credible study as "churn and instability." Turnover of teachers in the District of Columbia has been unusually high since 2009. With the kind of "churn" being experienced comes instability. The study's results, "How Teacher Turnover Harms Students' Achievements," indicate that students in grade-levels with higher turnover score lower in both ELA and math and that this effect is particularly strong in schools with more low-performing and Black students. Moreover, the results suggest that there is a disruptive effect of turnover beyond changing the distribution in teacher quality

## The School Closings Are Not Educationally Necessary

Given the pervasive racial and special education disparities in the school closures, it is incumbent upon the School District to demonstrate that the closures are educationally necessary. However, to date, the District has made no real effort to show that, in the face of significant disparities, the closures were nevertheless educationally or financially necessary. Indeed, the credible evidence supports the view that school closings are not a legitimate means of school turnaround and that they do not raise student achievement. There is no evidence of school closings resulting in any substantial long-term improvement on student performance. Additionally, respectable academic studies suggest that student achievement often falls during the final months of a closing school's existence. Moreover, the proposed closures are not financially necessary. There is no way of knowing at this point the true financial impact of school closures in the District of Columbia. Past reports indicate that the 2008 school closings resulted in a loss of $40 million rather than the expected gain of $23 million. In addition, at least one national study of the financial impact of closing schools has raised serious questions about the financial savings that result from closing schools, in part because the savings associated with closing schools are offset with enormous expenses, including maintaining the sites for resale or future use, transporting school property like computers and desks, and making improvements at the schools slated to receive the displaced students. Selling or leasing the surplus buildings also tends to be difficult.

Finally, to explain that these schools were slated for closure primarily because they happened to be the schools with the oldest buildings that had fallen into disrepair and thus costly to maintain, is no answer. If that is indeed true, then it is only evidence of long term disparate treatment of these protected classes. One cannot remedy decades of discrimination in the form of financial

neglect of schools in certain neighborhoods by choosing to close the schools in those neighborhoods in their entirety.

## A Moratorium until Decisions Are Done Right

The Chancellor must develop an alternative plan that results in fewer disparities for Black, Hispanic and Latino Students, and Students with Disabilities. Even if it is found that the school closings are educationally necessary, we assert that there are other, equally or more effective courses of action that would both reduce District costs and result in reduced disparities. However, the District has made no effort to explore any of these avenues, relying instead on criteria that inevitably have disparate impacts on communities already long neglected.

The Chancellor's proposed plan to close fifteen more schools in the next two years is fatally flawed. Before the Chancellor begins this second round of recent closures, she ought to develop a set of fair, clear criteria for schools that are eligible for closure. Any future plans must consider options that will not result in the burden of school closures being disparately borne by Black and Brown students and students with disabilities.

## Relief Requested

We respectfully request that appropriate authorities thoroughly investigate the fifteen proposed school closings as well as the Chancellor's criteria for deciding on these and future school closings, in order to determine whether there is any evidence that the District violated the United States Constitution, the D.C. Human Rights Law, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and/or Title II of the Americans with Disabilities Act of 1990 as well as the District's Procedural Due Process Laws and regulations, including the Sunshine Amendment.

The *Hobson Case* and the *Waddy Decree* reflect the kind of judicial interventions that have been helpful in shaping and forming a fair and equal educational system in the District of Columbia. They provide important and instructive examples for the current School Closings dilemma. You cannot have One City if you do not have One Standard.

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